DOCUMENT RESUME

ED 175 289 FL 010 705

AUTHOR	Grant, Joseph H; Goldsmith, Ross
TITLE	Bilingual Education and Federal Law: An Overview.
INSTITUTION	Dissemination and Assessment Center for Bilingual Education, Austin, Tex.
SPONS AGENCY	Office of Education (DHEW), Washington, D.C.
PUB DATE	May 79
NOTE	38p.
AVAILABLE FROM	Dissemination and Assessment Center for Bilingual Education, Educational Service Center, Region XII, 7703 North Lamar, Austin, Texas 78752
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	*Bilingual Education; Educational Change; *Educational Policy; Elementary Secondary Education; English (Second Language); *Federal Legislation; *Language of Instruction; Language Programs; Minority Groups; *Non English Speaking; Supreme Court Litigation
IDENTIFIERS	*Bilingual Programs; *Lau v Nichols; Limited English Speaking Ability

ABSTRACT

This report examines the most prominent decisions resulting from the 1974 Supreme Court Lau v. Nichols ruling that public schools cannot ignore the problems faced by students whose native language is other than English. Special attention is focused on the remedies that have been ordered to cure "Lau" violations. The activities of the Office of Civil Rights in formulating and enforcing administrative remedies are also reviewed. The issue of whether a bilingual program is required as a "Lau" remedy -- and, if so, what form that program must take -- is explored. The effectiveness of bilingual programs as "Lau" remedies is reviewed in a discussion of potential arguments that might be used by a school district involved in a "Lau" action. (Author/NCR)

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BILINGUAL EDUCATION AND FEDERAL LAW:

An Overview

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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ISBN: 0-89417-298-0

First Printing: May 1979

Abstract

In 1974 the Supreme Court in Lau v. Nichols ruled that public schools could not ignore the problems faced by students whose native tongue is a language other than English. The Court did not, however, address the issue of what specific remedies a school district must implement to correct failures to provide meaningful educational programs to such children. This paper examines the most prominent decisions resulting from the Lau ruling. Specific attention is focused on the remedies that have been ordered to cure Lau violations. The activities of the Office of Civil Rights (OCR) in formulating and enforcing administrative remedies for Lau are also reviewed. The issue of whether a bilingual program is required as a Lau remedy--and, if so, what form that program must take--is explored. The effectiveness of bilingual programs as Lau remedies is reviewed in a discussion of potential arguments that might be used by a school district involved in a Lau action acting in good faith to develop effective programs for children of limited English-speaking ability.

When the United States Supreme Court first ruled that separate but equal schools were not acceptable in light of the Constitution (Brown v. Board of Education 347 US 483, 1954), the federal courts entered an era of active involvement in U.S. education, strongly espousing the belief that the public schools should be open to all children, that none should receive second-class treatment, that no class of people should be arbitrarily marked as inferior. In 1974 the Supreme Court continued this line of reasoning in Lau v. Nichols. The Court ruled, for the first time, that public schools could not ignore the problems faced by students whose native tongue was a language other than English.

The details of what needed to be done, by whom and for whom, were, and still are, uncertain. One thing is clear: change will come to this area of education. To understand the probable scope of this change, one must examine the judicial opinions which have mandated it. This paper is an attempt to outline the current position of federal law in relation to bilingual education and to thereby shed some light on what may be expected in the future.

Lau v. Nichols

The landmark case in the field of bilingual education is Lau v. Nichols. The action originated in San Francisco, California, during March of 1970. After four years of litigation it was finally resolved by the Supreme Court of the United States. It is worthwhile to study the struggle in this case from the

beginning because it should lay to rest many of the arguments that are posed by those who would resist bilingual education programs and at the same time show that the nature of these programs is still unclear.

The court action was brought by thirteen non-English-speaking Chinese-origin students on behalf of the approximately three thousand Chinese-speaking students in the school district. The defendant was the San Francisco Unified School District. These students alleged that they were being effectively denied an education because they could not comprehend the language in which they were being taught. It was further claimed that this deprivation of an education was "dooming these children to become dropouts and to join the rolls of the unemployed." They argued that the failure to teach them bilingually should be prohibited on two legal grounds: first, that not to do so was a violation of their Constitutional right to "equal protection under the law"; second, that it was a violation of the Civil Rights Act of 1964.

The first court to consider this action was the United States District Court in San Francisco. The suit was not brought as a matter of course but as a last effort in a long community struggle to have a grievance redressed. Indeed, the seriousness of the students' position was admitted by the school district. It was agreed that in 1970 there were 2,856 Chinese-speaking students in the school district who needed some sort of remedial

attention and that of these, 1,790 were not getting any help at all. Of the 1,066 who were being helped, two-thirds were getting only special instruction on a part-time basis in the form of a fifty-minute class each day. Furthermore, only 260 of these students were being taught by a teacher who was bilingual and Chinese speaking. In other words, almost two thousand children were sitting in class every day comprehending almost nothing of what was being said. Certainly they could not be expected to compete with the children who could understand English. This was of little surprise to the school district. In 1969 it admitted as much by saying:

> When these [Chinese-speaking youngsters] are placed in levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular work.... For [these] children, the lack of English means poor performance in school. The secondary [student] is almost inevitably doomed to be a dropout and [become] another unemployable [person] in the ghetto.

It is difficult to imagine how the plaintiffs could speak more eloquently for themselves. These surveys, estimates, and admissions were made by the school district itself (Steinman 1974, p. 3). They are the working considerations of the established educational authorities. These were also not declining figures, but were markers of a growing problem. In April of 1973, a further study commissioned by the Human Rights Commission of San Francisco showed that 3,457 Chinese-speaking students were seriously deficient in their use of English and that no more than 1,707 of them were receiving any sort of help (Lau v. Nichols 94

S. Ct. 786, 787 (1974) n1). The problem was continually growing and had been with the San Francisco community for decades, largely ignored and clearly unresolved.

When confronted in district court, the school district argued that these students were not being discriminated against. The reasoning used was that they were being taught in the same facilities and by the same teachers at the same time as everyone else. Thus, since everything was the same for all students, there was no discrimination and, therefore, no violation of anyone's right to equal protection. In effect, their position was that the schools had no obligation to recognize and respond to the demonstrable communication difficulties encountered by these non-English-speaking students.

The district court ruled in favor of the school district, agreeing that all that was required was equal access to the school facilities and not the opportunity to derive equal benefits from such access. To quote the court: "They received the same education made available on the same terms and conditions to other tens of thousands of students in the San Francisco Unified School District" (Lau v. Nichols 483 F. 2d 791, 793 [9th Cir. 1973]). Another point repeatedly stressed by the court was that this problem was of recent origin and had been caused by a large influx of Chinese immigrants between 1965 and 1970. There had indeed been an increase in the number of immigrants in recent years; however, the school district's own records showed that the

problem had existed for years and had demonstrated no signs of ceasing to exist.

Clearly, the trial court's decision was unacceptable to the students involved. They appealed to the United States Circuit Court of Appeals for the Ninth Circuit. They made the same arguments, offered the same justifications, and asked for the same relief. The circuit court chose to affirm the decision of the district court (483 F. 2d 791, 1973). The circuit court accepted all of the district court's rationales for the decision. They did, however, go on to make some observations on the cause which were even more unfavorable to the students. As the plaintiff's counsel Edward H. Steinman notes, "The court callously observed that the problems suffered by the children were not the result of laws enacted by the State . . . but the result of deficiencies created by the [children] themselves in failing to learn the English language" (Steinman 1974, p. 5). The court also observed that

> every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and contributed completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to the 'denial' by the [school district] of educational opportunities...should the [district] fail to give them special attention (483 F. 2d at 797).

After hearing the decision of the circuit court, the students took the last step and appealed to the Supreme Court. Here, finally, they received some satisfaction.

First, the Supreme Court laid to rest the argument that equal access to the facilities provided equal treatment and equal educational opportunity. To quote the Court:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that before a child can effectively participate in the educational program he must already have acquired these basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful (94 S. Ct. at 788).

Having provided a reason for its actions, the Court went on to clarify the grounds for the decision. The decision was <u>not</u> based on a Constitutional requirement. In fact, it expressly does not even consider that argument of the plaintiffs. Instead, the entire rationale is provided by §601 of the Civil Rights Act of 1964. That section reads as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This section was a mandate by Congress to make sure that federal monies were spent in a nondiscriminatory fashion.

The government groups involved were also given, by §602, the right to make decisions as to how the funds should be spent and to design adequate safeguards in order to protect the funds from misuse. Thus, the government agencies are empowered to issue reasonable guidelines which must be complied with. If compliance is not obtained, then the federal agency can withhold these

funds. The Court went on to clarify the term "discrimination" by saying that it was something which has a discriminatory effect even though no purposeful design is present (95 S. Ct. at 788).

The reasoning was applicable in this case since the school district was the recipient of a large sum of federal funds. By accepting these funds, the school district had contractually agreed to all the regulations of the Department of Health, Education, and Welfare, which were issued pursuant to §602 of Title VI of the Civil Rights Act of 1964. They also had agreed to take any measure necessary to implement the agreement. The school district was clearly not complying with a legally imposed regulation.

However, the Court did not specify the course of action to remedy the problem. Instead, it sent the case back down to the district court with instructions to decide on "appropriate relief." "Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others" (94 S. Ct. at 787).

By choosing to base their opinion on a statute rather than on the Constitution, the Court restricted the remedies for making sure that bilingual education be established throughout the country. Under this decision, a school district which accepted no federal money would be exempt from these federal agency guidelines since the district had not contractually agreed to

anything. Congress reacted to fill this gap by expanding the applicable law. Now, under U.S.C. 20, §1703f:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Another limiting facet of the decision was the separate concurring opinion of Justice Blackmun. Blackmun agreed that in this instance the need for remedial help was clear; however, he went on to say:

> . . . that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision or the separate concurrence as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly (94 S. Ct. at 791).

Obviously this does not provide a clear guide as to when the number of affected students is small enough to become insignificant under this opinion. Consider also that this decision passed unanimously while the caveat on the number of students which must be affected was endorsed by only two of the justices. It is possible that the majority of the Court would require a plan of affirmative action by the school district no matter how small the number of affected students.

The impact of Lau was tremendous, but what exactly does it mean? What is now going to be required that wasn't required before? Since the Supreme Court did not prescribe a specific

remedy, leaving that task to the district court, it is necessary to look to the lower-court decisions which have been issued since the Lau ruling.

Serna v. Portales

The first of the cases was Serna v. Portales Municipal Schools, 199 F. 2d 1147 (1974). This was a case which all parties concerned admitted was exactly like Lau (Id. at 1152). Therefore the circuit court simply followed and interpreted the language of the Supreme Court in reaching a decision. This decision is interesting in its discussion of three areas: what constitutes an acceptable remedy, who can propound such a remedy, and when such a remedial program will be required. This first question of what is an effective remedy is answered by the court saying, "A student who does not understand the English language and is not provided with bilingual instruction is therefore effectively precluded from any meaningful education" (Id. at 1153). This is the first instance of a court expressly requiring bilingual education as such.

The question of who could propose a remedial bilingual education plan was raised when the New Mexico State Board of Education and the appellants argued that the trial court's decision to impose a particular plan of instruction constituted an unwarranted and improper judicial interference in the internal affairs of the school district. The court replied that

> . . . [once] a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. . . . Under Title VI of the Civil Rights Act of 1964 appellees have a right to bilingual education. . . . we believe the trial court, under its inherent equitable power, can properly fashion a bilingual bicultural program which will assure that Spanish Surnamed children receive a meaningful education (Id. at 1154).

Thus, the authority of a court to prescribe a curriculum is clearly established. It is important to know that, in this case, the plan upheld was not completely bilingual. It consisted of having special periods set aside each day for bilingual instruction.

The third area explored was that of when a program would be required. This court followed the reasoning of Blackmun in saying that numbers are at the heart of the case. Unfortunately, there is still no real explanation of when the numbers will be so few as to obviate the need for the program. The court says, "Only when a substantial group is being deprived of a meaningful education will a Title VI violation exist" (Id. at 1154). The question remains, What is a substantial number?

Aspira v. Board of Education

The next important lower-court decision is Aspira of New York, Inc. v. Board of Education of City of New York (394 F. Supp. 1161 [1975]). This case was concerned with problems in determining who was entitled to receive special bilingual instruction. After all, it is one thing to say that those

students who are having difficulty should be helped, but it is a much more detailed problem to determine who needs the most assistance. The question is important not only in determining the size of the program, but also in determining its quality and substance. The type of testing done to find out who will participate in the program is in many ways a guide to what the program will be like. The United States District Court of New York fully realized this when it ruled on the Aspira controversy.

The court did not address the merits of the various tests being used. It did say that all students should be given a test to determine their proficiency in the use of the English language. Those students who fall below the twentieth percentile and who come from a Hispanic background should be given another test to determine their proficiency in Spanish. If their percentile score in Spanish is higher than in English, they should receive bilingual instruction. Some of the specific language of the court is quite illuminating in reference to the court-perceived goals of bilingual education. First the court comments:

> As has been noted, the assertedly "ideal" view of plaintiffs--to test all Hispanic students in Spanish and give the bilingual program to all who do better in Spanish than in English--is not accepted. In addition to the reasons noted earlier, we may observe that the decree is not meant to enroll for bilingual instruction all who are more fluent in Spanish than in English. The setting and the goal remain a course of English language instruction, so those who can now participate "effectively" in English are outside the plaintiff class, whatever their relative fluency in Spanish might be (Id. at 1165).

Thus, the court has said that all students who score above the twentieth percentile in English are presumed competent in English and therefore need no bilingual help and are entitled to none. Further, the court says that those scoring below the twentieth percentile are entitled to receive help if and only if their Spanish capability is greater than their English capability. It should also be pointed out that the court was well aware of the limitations of this procedure (Id. 1165, 1166). They simply observed that as of yet nobody has designed a better system for distinguishing those who do and do not need a special language program to make possible a meaningful education.

Keyes v. School District No. 1

The next major decision is Keyes v. School District No. 1, Denver, Colorado. As with Lau, the Keyes litigation has gone on for a number of years. As in the Lau case, the Supreme Court remanded the case to the district court in order that a remedy might be developed (93 S. Ct. 2686 [1973]). The remedy proposed by the district court (380 F. Supp. 673 [1974]) was subsequently challenged, and the case was finally resolved by the United States Court of Appeals, Tenth Circuit (521 F. 2d 465 [1975]). By comparing these two opinions, the probable scope of what will be required and accepted as Lau remedies begins to be focused more clearly.

The Keyes decision was not primarily concerned with bilingual education. The case arose because of the segregated school zones in Denver. As part of the program for desegregation, an education specialist, Dr. José Cárdenas, designed special classes for Chicano students who were having difficulty learning by using only English. The district court approved of this, saying:

> One educational element called for by the proposed Cardenas Plan is the utilization of bilingual training, particularly in the low elementary grades. Currently many elementary school Chicano children are expected not only to learn a language with which they are unfamiliar, but also to acquire normal basic learning skills which are taught through the medium of that unfamiliar language. Some provisions for effecting a transition of Spanish-speaking children to the English language will clearly be a necessary adjunct to this court's desegregation plan (380 F. Supp. 673 at 695).

The district court went on to praise and adopt the Cárdenas Plan. This opinion goes beyond saying that these children must receive bilingual instruction in Spanish and English. It seems to require that the students also receive instruction in other subjects in their native tongue until they can effectively compete in English. In formulating the integration program, the district court allowed several schools to remain predominantly Spanish surnamed in composition. This was part of the Cárdenas Plan, and at the express wish of the Spanish-speaking community. The purpose of this continued extensive segregation was to allow for a more efficient and effective implementation of a bilingual education program.

On appeal, the appellate court called for a much more restricted approach and rejected judicial implementation of the

Cárdenas Plan. In considering the district court's remedy, the court of appeals observed:

> The court's adoption of the Cárdenas Plan, in our view, goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far. . . . The clear implication of arguments in support of the Cárdenas Plan is that minority students are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not (521 F. 2d at 482).

The court went on to point out that Denver had a diagnostic program to identify students who might have difficulty and a variety of programs designed to meet the needs of these students; that there was no violation of federal law; and that, even if there were, it could be remedied by a plan substantially less drastic.

Otero v. Mesa County Valley School District No. 51 (408 F. Supp. 162, 1975)

This case followed the Tenth Circuit Court of Appeals' decision in Keyes almost immediately and follows its reasoning exactly. Here again plaintiffs were seeking to have a Cárdenas-style program implemented by judicial decree. Once again the courts refused. Although the decision goes on at length about the failure of the plaintiffs to adequately justify the need for a Cardenas-type plan from an educator's viewpoint, the judge

makes his basic objection to court interference with the schools when he says:

> Lau and Serna both had to do with large numbers of students who had language deficiencies and who could not learn English. Our case involves a very few, if any, students who have real language deficiency. Lau and Serna dealt with school boards which were making no real effort to meet the problem. We deal with a school board which is making a real, conscientious effort to recognize, face and solve any problem which may exist as to any student. . . . District 51 has made and is making a real effort, an all-out effort, which in no circumstances can be said to be a mere token effort. I could do no better, and I do not believe that a federal judge should step in where the school board and the school officials are doing their best and are doing a good job (408 F. Suppl. at 171).

The court went on to say it "found the Cárdenas Plan to be illogical, unbelievable and unacceptable." The court further concluded that "there is no constitutional right to bilingual/bicultural education." The court stressed the value of local control and involvement in the public school system and emphasized that, barring a failure to comply with the law, the local officials should be given wide latitude as to how they should run their schools, so as to encourage such involvement. Once again the court refused to create a segregated school system in order to further the specific interests of a foreign-language-speaking minority.

There has been an appeal of this decision, Otero v. Mesa County Valley School District No. 51, et al., 568 F. 2d 1312 (1977), only as it impacts on the minority-hiring practices of the district. The appeal questioned the trial court's Memorandum Opinion only in relation to this point; plaintiffs did not

appeal the decision insofar as it related to the district's program for bilingual education.

Morgan v. Kerrigan, Evans v. Buchanan, and United States v. Texas Education Agency

These three cases are all primarily concerned with integration. They touch only briefly on the issue of bilingual education, but, in contrast to Keyes, they do give some indication of how far the courts are willing to adjust their programs for integration so as to allow for effective bilingual programs.

In U.S. v. T.E.A. (522 F. 2d 380 Fifth Circuit, 1976), the court ruled that regardless of how the district was finally integrated, the bilingual program would have to be maintained.

> The AISD has an ongoing bilingual-bicultural education program that the Superintendent of Schools testified would continue "regardless of the level of federal funding." Indeed, state and federal law require as much. . . . The district court properly made this commitment a part of its decree (Id. at 398).

Clearly, integration is not going to become an excuse to eliminate or fail to develop legally mandated bilingual programs.

In Morgan v. Kerrigan (401 F. Supp. 216, 1975), the court as a part of the overall desegregation scheme for the Boston schools allowed for a concentration of students experiencing difficulty in class due to their speaking primarily a foreign language.

> Assignment of bilingual students before others will prevent excessive dispersal. Thus the "clustering" of bilingual classes will be possible and Boston's schools will be able to fulfill the promise of this state's exemplary bilingual education law (Transitional Bilingual Education

Act. Mass. G.L. c 71A), as well as to meet the requirements of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000d) (Id. at 242).

Here the court did not let bilingual classes interfere with its program for integration. It gave minority students who needed to be concentrated in order to receive bilingual help priority in school assignment. Both goals were achieved.

In Evans v. Buchanan (416 F. Supp. 328, 1976), the court ruled that the school board ". . . shall in the course of implementing this decision insure that those students will be placed in schools in sufficient numbers to allow the program to continue; . . . " (Id. at 360). These three cases are not in conflict with Keyes. Integration and bilingual education are not mutually exclusive goals although at times, in the short run, they seem at cross purposes. Integration is the end. Bilingual education is one of the means. Neither should exclude the other, and as these last three cases show, they need not.

Having considered the early post-Lau court decisions touching upon the educational rights of non-English-speaking children, it is time to ask what conclusions can be drawn.

First, without any doubt the public schools are going to have to institute programs which will provide non-English-speaking children with some sort of meaningful education. These programs must be designed to teach these children to read, write, and speak English. Interestingly, the Lau decision does not require any specific program. Bilingual education has not been

specifically mandated by the Supreme Court. However, every court which has approached the problem of providing a meaningful education to the non-English-speaking student has concluded that some form of bilingual education is necessary.

This brings up the second point. The courts have not required that students be taught in their native language or even be provided a class in that language. What is required is a "meaningful education." If a student can get that by attending classes in English, then he is not being deprived of his rights even if he is more proficient in other languages. The schools are never required to teach the native language, only to provide a program so that the students can learn English while not falling too far behind in the other subject areas. Therefore, it has been held in Serna and Keyes that bilingual programs are necessary. However, Serna clearly accepts the idea that these students should be brought up to a level of proficiency in English as rapidly as possible so that they can go into the same classes as the monolingual English students. What is envisioned is not a program designed to produce a bilingual child, but instead a program which eases a child through the transition from his or her home language into English as quickly as possible and which causes the smallest possible difficulty for the child in his other subjects.

It is very important to remember that no one has been given the right to a bilingual education. Bilingual programs are only required as programs of language transition. The goal of the

courts is to eliminate language as well as race as a tool of discrimination in the educational process. The method mandated is that the schools teach these children English so that they will be able to compete. In keeping with the goal for eliminating discrimination is the Serna court's requirement that bicultural programs be established in order that these children might have a positive self-image and feel more at home in the classroom.

Third, there may well be some difficult problems with implementation of these programs. Aspira sets some guidelines for determining which students ought to be eligible, but as the court observed, the standards put forth are but crude approximations. This is an area where continued litigation should be expected. This is particularly true in light of the Lau and Serna opinions, which left open the possibility that the non-English-speaking population could be so small that its problems in education could be ignored.

Another implementation problem will come in the area of hiring enough qualified teachers to staff these programs. In a period of declining student enrollment, it will be a strain on school budgets to hire additional teachers. The alternative of replacing monolingual teachers with those that are bilingual is not politically attractive for many school boards. This latter plan is also likely to meet great resistance from the presently employed teachers. Such a course of action may also violate local or state tenure laws if monolingual teachers are dismissed

ahead of bilingual teachers having lesser tenure. Indeed, such a state of affairs occurred and was found illegal in Morris v. Brentwood Union Free School District, No. 75-87461 (New York Supreme Court, Suffolk County 1975), aff'd 52 App. Div. 2d 584, 383 N.Y.S. 2d 542 (2d Dept. 1976).

A fourth factor is the trend of judicial policy in favor of encouraging local participation in education. The courts are not equipped to take on the function of the school boards. Courts do not have the expertise to decide which educational program is best. Clearly this is a field in which reasonable men can differ. Therefore the courts have been, and will continue to be, reluctant to intervene in any situation where any sort of good-faith effort is being made. In this uncertain field, perfection is not required. If a school district is making no attempt to help these students, then it is clearly acting in bad faith. The courts will compel it to take action, as in Lau. If a school district is trying to find and aid these students, then it will have great latitude in designing its own programs, as in Keyes and Otero.

A fifth point is that this whole area is a part of the attempt to integrate the public school system. The primary concern is not to provide the best possible education for every student who speaks a language other than English. The primary concern is that these children be given access to an education just as is every other child. The student should not be penalized deliberately nor should he be ignored. Bilingual education will

not serve as an excuse for segregation. The whole point is to bring these students into the mainstream of society. The courts will allow these students to attend classes designed to help them with language just as with any other learning handicap, but they must be a part of an integrated educational system and they should be prepared to participate fully in English as rapidly as possible. The Tenth Circuit demonstrated the philosophy that the issue is not that of providing the best possible education but rather providing equal access to education when it reversed the district court's adoption of the Cárdenas Plan, saying:

> The clear implication of arguments in support of the Cárdenas Plan is that minority students are entitled under the fourteenth amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not (521 F. 2d at 482).

Although the courts have played a primary role in extending the interpretation of the Lau decision, the Department of Health, Education, and Welfare (HEW) and its Office of Civil Rights (OCR) have played an important role in interpreting and enforcing Lau. Indeed, the Supreme Court based its original Lau decision on an HEW interpretation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d [1970]). This HEW interpretation was in the form of a memorandum issued on May 25, 1970, regarding children of national-origin minority groups with limited English-language skills.

Since the Lau decision was based on Title VI, enforcement falls within the scope of HEW's OCR as well as the courts.

Accordingly, OCR convened a task force to develop remedies for Lau violations. In the summer of 1975 OCR completed a document titled H.E.W. Memorandum on "Task Force Findings Specifying Remedies for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." Although these remedies have been widely disseminated, they have never been published in the Federal Register for review and comment nor published in final form in the Register after such a review-and-comment period. Therefore they are not official HEW regulations--but neither was the May 25, 1970, memorandum upon which the Supreme Court relied in its decision.

Although HEW's guidelines do not have the binding legal force that a court opinion does, and can be challenged both administratively and through the courts, they are still entitled to much consideration. This is especially true since HEW has been given the power, by Congress, in §602 of the 1964 Civil Rights Act, of enforcing its guidelines, and this function was recognized and sanctioned by the Supreme Court in Lau v. Nichols. The courts will rely heavily on HEW's evaluation of proposed programs. After all, the courts are rarely experts in the field of education. They can say what the law requires, but they must often call on other expertise to determine if the law is in fact being complied with and to determine if the proposed remedies are likely to produce the results claimed for them.

The guidelines require that all schoolchildren be evaluated by bilingual personnel who are competent in the child's non-English tongue. This evaluation is to determine the child's primary language and his language abilities in both English and the primary language. The school district must then diagnose the student's educational needs and prescribe a program of education designed to bring his performance up to the level of performance of a monolingual English-speaking student. This program must work within the context of the school as a whole. It cannot serve as an excuse for segregating the minority students.

Having evaluated and diagnosed the student, the school must next enroll him/her in one of the four types of programs: a Transitional Bilingual Education Program, a Bilingual/Bicultural Program, a Multilingual/Multicultural Program, or an English as a Second Language Program. The last of these programs is only acceptable at the secondary school level, and the others are to be chosen on the basis of the student's needs. At all times in all of these programs, the goal is that the student participate in the regular curriculum to the greatest extent possible. The guidelines are, of course, much more specific than this, but, generally, the greater the student's ability to use English, the more of his program must be offered in that language. If a student is bilingual and achieves at his/her grade level in English, the school is not required to provide additional educational programs.

Abbreviated as this outline is, it should convey the general thrust of the HEW guidelines. They stress, as do the court decisions, that these programs are required only when the student cannot compete in English and would be better able to do so in his native language. The programs must be no more than transitional. At no point do the guidelines suggest that a goal is to produce a bilingual student. The agency position is that such programs should be provided if only one student is affected, but for reasons of priority no OCR action will be initiated if fewer than twenty students are involved.

None of the courts in the cases noted thus far have employed the OCR remedies for Lau, noted above, as standards for designing a remedy for a Lau violation. The first such case (and the only one reported to date) is Cintron v. Brentwood Union Free School District (E.D. New York, #77-C-1370, Memorandum of Decision, January 1978). This case began when the defendant district dismissed seventeen of twenty-four bilingual teachers (a total of forty teachers were dismissed due to declining student enrollment) in accord with the state court mandate in Morris v. Brentwood which directed that dismissal be based on seniority. The state court held that, under New York law, there is a single tenure area which includes bilingual teachers and that teacher dismissals occur beginning with those with least seniority (New York S. Ct., Suffolk Co. Aug. 14, 1975, Aff'd 52 App. Div. 2d 584, 383 N. Y. S. 2d 542, 2d Dept. 1976). Since only seven bilingual teachers

were to be retained, the district developed a method (Plan V) of providing bilingual education with the reduced teaching staff. The bilingual program operating in the district was funded by a discretionary grant under Title VII of the Elementary and Secondary Education Act of 1965 as amended in 1974 (PL 93-380, 20 USC 880b), and it had been in operation for five years prior to the action. This program (Project Avelino, which the plaintiffs wanted continued) and the district's alternative (Plan V) were examined by the court in light of the Lau guidelines since "the guidelines are entitled to great weight" (p. 13, memo of decision, quoting from 94 S. Ct. 786 at 790). The court found that both Project Avelino, as operated prior to the teacher dismissals, and Plan V failed to meet the standards of the guidelines and statute.

Project Avelino was found to be in violation of 204(f) of the Equal Educational Opportunities Act of 1974 (20 USC at 1703[f]) and the Lau guidelines because

> [the project director] deliberately conducted Project Avelino as a maintenance program and discouraged transfer out of the program. She failed to provide a mechanism for removing students who reached the level of proficiency in the English language which would enable them to understand regular English instruction. Fifty-three students were retained in Project Avelino after it had served its mandated objective. To that extent the administration of the bilingual program was a perversion of the purpose and misuse of funds (p. 15).

Plan V was found unacceptable because identification of language-deficient students in the upper grades was unspecified and because the program relied heavily on pulling children out of the regular class for remedial work, which might cause the

children to receive insufficient assistance or, on the other hand, to miss too much regular classroom instruction. The court ordered the district to develop a plan that would

> provide a method for transferring students out of the program when the necessary level of English proficiency is reached. It should not isolate children into racially or ethnically identifiable classes, but it should encourage contact between non-English and English speaking children in all but subject matter instruction (in the earliest classes, i.e. kindergarten and first grade, where subject matter is of lesser importance, the program should emphasize the need for contact between non-English and English speaking children) (p. 18-19).

This court has clearly reiterated the position that integration takes priority over bilingual education as a curricular offering. This opinion also raises the possibility that the maintenance programs endorsed by many bilingual education advocates may not only be illegal under current federal funding, but excessive as Lau remedies.

The substance of OCR's Lau remedies requires a bilingual program at all levels with the possible exception of permitting an ESL (English as a Second Language) program for secondary schools. They are heavily weighted toward teaching a child in his primary language while that child is learning English. However, they do not require a district to teach a child a language other than English except to the extent that such instruction is necessary for the child to benefit from subject-matter instruction in that language while English is being learned. The remedies allow a transitional bilingual program rather than requiring a maintenance program (one in which the

non-English language is taught and maintains equal status with English so that the end product is a bilingual individual). The debate over appropriate remedies to Lau centers around whether a maintenance program should be required or whether a transitional or ESL approach is satisfactory. The remedy sought in Keyes and Otero (the Cárdenas Plan) and Cintron (Project Avelino) typifies the sort of court-ordered remedy sought in Lau cases. These remedies are designed to maintain the language and cultural heritage of the minority children while also resulting in the acquisition of English proficiency, a program Epstein (1977) characterizes as "affirmative ethnicity." Only one court-ordered remedy approaches this standard, and that decision resulted from a desegregation suit decided three years prior to Lau (U.S. v. Texas, 342 F. Supp. 24, 1971, aff'd, 446 F 2d 581, 5th Circuit, 1972). In that case, bilingual bicultural education programs were ordered as part of a remedy for past segregation (operating a dual school system: one for Anglos, one for Mexican Americans). No post-Lau court has gone so far.

Since the courts can be expected to give "great weight" to the OCR recommendations for remedies in instances of Lau violations, it is worth examining the current OCR practices in formulating acceptable compliance plans where a district is found in violation of Lau as a result of OCR review. The form of remedy OCR attempts to obtain through administrative procedures will probably closely resemble the order sought from a court in the

event OCR is unable to reach an administrative solution with a district and is therefore forced to seek judicial intervention.

In a personal conversation (January 16, 1978) we asked James Littlejohn, of the Dallas Regional Office of Civil Rights, how OCR was treating the Lau guidelines. He said that OCR was treating them as internal guidelines for judging the adequacy of compliance plans submitted to that agency. They are viewed "in the nature of an internal memo," and OCR exercises some flexibility in their application to specific cases. Although all specifics of the guidelines are not rigidly enforced, a district's compliance plan must include: 1) a method of identifying children with limited English-speaking ability; 2) provisions to teach content areas in the primary language of the children at elementary school level; and 3) an ESL component at both primary and secondary levels.

In practice, then, OCR's minimum requirements are that a district provide a transitional bilingual program with an ESL component at the primary level and an ESL program at the secondary school level. Identification of eligible students must be accomplished by determining the language the child speaks at home and then testing the child to determine relative proficiency in the non-English language and in English. Testing must be accomplished by a person proficient in the non-English language, or with the assistance of such an individual.

OCR views a transitional bilingual program as the minimum remedy at the primary level. The assumption is that such a program will cure the violation and constitutes the best avenue to providing equal educational opportunity for children with limited English-speaking ability. There is, however, no empirical evidence that substantiates this view. The Conditions of Bilingual Education in the Nation: First Report by the U.S. Commissioner of Education to the President and the Congress (November 1976), concludes:

> Despite the plausible educational rationale for bilingual education, a related body of supportive research has not emerged. . . . the research does not even provide substantial evidence that bilingual education is better than a nonbilingual approach. Consequently, the pedagogical rationale for bilingual education must rest upon reasonable but unproven assumptions (p. 13).

Given the lack of evidence that a bilingual program works to effectively provide equal educational opportunity, OCR has taken the position that

> school districts are entitled to design and submit proposals which vary from the "Lau Remedies." In such cases, the school officials must demonstrate that their proposals will be equally effective in ensuring equal opportunity. (Statement of Lloyd R. Henderson, Director of Elementary and Secondary Education Division, OCR, in Hearings before the Elementary, Secondary, and Vocational Education Subcommittee; Committee on Education and Labor, House of Representatives, June 7, 1977; p. 128.)

Although this sounds quite reasonable, there is a "catch 22," as one school official noted after having signed a Lau agreement with OCR: "How can you prove that something is equally as good as something else which nobody has proved the worth of? You come to a logical dead end on that one immediately" (Epstein, p. 15).

In scientific inquiry, such a state of affairs would be viewed as two (or more) competing hypotheses of equal status. This is not the case where the same hypotheses are viewed in the context of civil rights litigation, as Teitelbaum and Hiller note:

> In shifting to school authorities the burden of demonstrating that educational programs not conforming with programs contained in the Lau remedies are "equally effective," the Lau remedies at a minimum create a legal presumption in favor of bilingual education at the elementary and intermediate levels. This is a presumption that school districts may have great difficulty overcoming: it is particularly true of civil-rights litigation that the party able to shift the burden of proof is most often the party that prevails (p. 153).

If a school district were to overcome this legal presumption, the district would have to show, at a minimum, that its alternate plan was developed in good faith with the sincere goal of providing equal educational opportunity and that the alternate plan would be likely to result in a positive effect, at least equal to that which could be expected to result from a bilingual program developed in accord with the Lau remedies. Demonstrating good faith necessitates an examination of the specific circumstances of each district. Demonstrating the equal effectiveness of alternate (nonbilingual) remedies may be somewhat easier today than it was even a few months ago.

In 1974 the Office of Planning, Budgeting, and Evaluation (now the Office of Evaluation and Dissemination) of the Department of Health, Education, and Welfare commissioned a multimillion-dollar, multiyear study of the impact of bilingual education

programs funded under Title VII of the Elementary and Secondary Education Act of 1965. The American Institute of Research conducted the study using a national sample of thirty-eight bilingual programs that had been operating for at least four years. The study examined the performance of over seven thousand students in grades two through six during the 1975-76 school year. A somewhat smaller sample of these students (about four thousand) were followed up in the 1976-77 school year to allow more time for program effects to become evident. The final volume of this study was printed in January 1978. This study found, among other things, that bilingual programs: 1) were no more effective than nonbilingual programs in raising math achievement of target students; 2) were somewhat less effective than nonbilingual programs in raising English-language performance; 3) had no positive effect on students' attitudes toward school; and 4) cost over $375 per child per year more than nonbilingual programs. The only positive effect discovered in favor of bilingual programs was that students in these programs learned more Spanish than their nonbilingual-program counterparts.

This study is significant in that it is the only such research available on the effects of bilingual programs and is likely to retain that distinction. This latter point is important, since conducting a study comparing a bilingual program with a nonbilingual program using elementary school children would place the investigating district in potential violation of OCR's

Lau remedies, since the design of such a study would necessitate that some children be deprived of the equal educational opportunity of participating in the bilingual program. As a result, the AIR-study findings will probably represent the only such evidence a district could introduce in a Lau suit.

It is in this context that the Office of Civil Rights and the courts will continue to define permissible remedies. The educational latitude of potentially effective remedies is broad, as the Supreme Court observed in Lau:

> Teaching English to the students of Chinese ancestry (an ESL program) who do not speak the language is one choice. Giving instruction to this group in Chinese (a bilingual program) is another. There may be others (94 S. Ct. 786, 787).

In any case, the parameters of a final form of acceptable remedies for Lau have not been settled either educationally or judicially.

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☆U.S. GOVERNMENT PRINTING OFFICE: 1979 — 673-635